VICTOR | PROFESSIONAL SURVEYORS CANADA / GÉOMÈTRES PROFESSIONNELS DU CANADA

Loss control bulletin | Land surveyors | Professional liability insurance

To tell or not to tell, that is the question



As professionals, land surveyors want to be accountable to their clients. When something goes wrong, they want to be part of the solution.

Navigating a claim or potential claim situation can present dilemmas. Land surveyors need to be aware of their obligations under the terms of their errors and omissions insurance policy as well as how their actions may have consequences on the coverage their policy is intended to provide. The goal of this bulletin is to provide land surveyors with some guidance when faced with a claim or potential claim. Craig Wallace from the law firm Clyde & Co. provides an example of a situation in which land surveyors could find themselves in and highlights some helpful advice on how to navigate the pitfalls that may arise. Following this, we highlight your obligations as an insured under your Victor errors and omissions insurance policy as well as outline what you can expect from our Victor claims team when you report a claim or potential claim.



A bad day

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Arriving at the site of your client's dream home a few days after your crew has laid out the foundations, you notice that the forms, now ready for the concrete, appear much closer to the road than you had expected. The construction crew watches with interest as you scurry between the forms and your benchmark on the road. Your worst fears are confirmed by a few quick measurements just as the concrete truck pulls up to the curb. The house is eight feet too far north. The anxious owner asks if everything is okay. With the concrete hardening in the truck and a crew of workers at the ready, you remember something in your insurance policy about admissions of liability voiding your insurance coverage. **What do you do?**

Protect yourself

This dilemma can be particularly difficult for land surveyors. Their professional duty to their client requires them to inform the client when something is wrong so that the client can take the appropriate steps, even if that means ultimately suing the surveyor. However, there are good reasons for being cautious and making sure no admission of liability is made.

A crucial reason the surveyor should not admit liability on the discovery of an error is that insurance policies contain a clause providing that an admission of liability may void the insurance coverage. This provision is to provide the insurer with an opportunity to assess the situation, obtain legal advice and determine the extent to which its insured is exposed to liability. If the surveyor deprives the insurer of that opportunity, the surveyor may lose coverage.

Another important reason the surveyor should not admit liability is to preserve all defenses available until all of the facts are known. In some cases, liability for the error is not seriously contested. However, the consequences and exact cost of the error may remain in dispute.

If an admission is made, the parties may not later agree as to exactly what was admitted. An owner who is facing a claim by the contractor for extras or delays may try to lay blame on the surveyor's error. In admitting liability, the surveyor may unwittingly admit responsibility for costs which do not properly flow from the error. The claim should first be reported before any consideration can be given to making an admission.

The situation is complicated by the fact that surveyors' mistakes are so often black or white. The house is either in the right place or it is not. If it is not, there are few cases in which this would not be the result of an error or omission on the part of the surveyor. It would therefore seem difficult to tell the client of the problem without admitting the error. So how does the surveyor do it?

Unfortunately, there is no easy answer to this question. Each different situation will involve a delicate balance of client relations, professional ethics, and preservation of the surveyor's own rights. The most important thing for the surveyor to remember is that the problem should be addressed only with the assistance of the insurer and legal counsel.



Assess the situation

The first task will often be one of buying some time. In the example above, the surveyor would have to stop the concrete pour. The owner, of course, is going to want an explanation. The surveyor should explain that the forms could be in the wrong location. The surveyor should not say that the forms are in the wrong location, but only that this is a possibility and he or she needs to do some checking. The surveyor should, in no circumstances, say that the reason the forms are in the wrong place is because of an error.

Practically speaking, of course, advice like this will tip off the owner to the fact that the surveyor has made an error. Unscrupulous owners may rely on the admission and try to claim costs unrelated to the error. If the client presses for details, the surveyor should simply say that he or she is not yet at liberty to discuss the reason the forms might be in the wrong location.

Although it would be preferable to leave the question of insurance out of the discussion, the surveyor may tell the client that he or she must discuss the matter with the insurer before anything more can be said. Although this advice may leave the client wondering, most clients will be understanding if the surveyor acts quickly. Clients very often appreciate that the surveyor must consult the insurer; after all, the client in this situation also has an interest in preserving the surveyor's insurance.

This course of action will provide the surveyor with the time to do the necessary checks and to contact the insurance broker. If an error has been made, the surveyor, the insurer and perhaps an independent adjuster or legal counsel will be involved in any decision to remedy the problem and may assist the surveyor in making a without prejudice offer to correct the problem.

Without prejudice negotiations and settlement

The term without prejudice is often misunderstood. It does not have a complicated legal meaning; it is simply a way of communicating to a party that the suggestion or offer which follows is not an admission of liability or a waiver of rights. This communication should be handled by the surveyor's insurer, independent adjuster or legal counsel, or at least in consultation with them.

In the example above, if the surveyor offers to relocate the forms without prejudice, he or she does so without admitting it was an error that placed them incorrectly in the first place. If the offer is accepted, construction can continue and the question of the surveyor's liability, and most importantly, any costs for which the surveyor is responsible, can be resolved at a later date. In that way, the project can proceed and the rights of the surveyor will be preserved.

In some cases, correcting the error will be more difficult than simply moving some form work. Other surveyors and even the other professionals may be involved in designing remedial work. But whatever the remedy, any offers to perform remedial work, as well as any work done, should be on a without prejudice basis. In many cases, the client and the surveyor's own legal counsel will require that a full and final settlement be agreed upon before any remedial work is done. There may, therefore, be negotiations involving several without prejudice offers between the parties before a final settlement can be reached.

All of this should be done in conjunction with the surveyor's insurer and legal counsel.



If these procedures are followed, the error can be addressed as quickly as possible and the surveyor has the added benefit of insurance coverage.

Errors and omissions insurance policy obligations

Notice of a claim or potential claim (incident)

Victor's errors and omissions insurance policy requires that you give written notice to the insurance manager of all claims and circumstances that could reasonably give rise to a claim as soon as practicable after being made aware of them. Prompt notification is required by your policy and is essential to enable the insurance manager to provide early advice to you and to ensure that your rights and interests are properly protected by taking any necessary action at the earliest opportunity.

For construction projects in particular, timely reporting is paramount so that any costs for construction delays can be avoided or mitigated.

What is a claim or potential claim?

Victor's errors and omissions insurance policy defines a claim as a written or oral demand for money or services or a written or oral allegation received by you and resulting from a single actual or alleged error, omission or negligent act in your rendering of professional services for others.

A potential claim on the other hand could be a fact, situation, or circumstance which could reasonably give rise to a claim. Notice of a potential claim should also be provided to the insurance manager in writing and should include a description of the specific error, omission, or negligent act committed by you in the rendering of professional services for others which forms the basis of the potential claim; the name of the potential claimant(s); and the circumstances by which you first became aware of the specific error, omission, or negligent act.

Admissions

In addition, the policy requires you not to admit any responsibility, assume any obligation or make any commitment of money or services without the insurance manager's consent, even if you believe there may have been an error, omission, or negligent act in the rendering of professional services for others on your part.

This can be difficult, especially if there is an ongoing relationship with the client. Discuss the situation with your insurance manager to determine the best way to communicate the situation. Also, make sure that your staff is aware of the requirement not to admit liability.



The Victor claims team

Claims analyst

The claims analyst is a trained insurance specialist with experience in claims management. The role of the claims analyst is to advise you of the coverage that your insurance policy provides for a particular claim and to answer any questions you may have about coverage or your role in the defence of a claim.

The claims analyst will also evaluate the claim and determine the best method of bringing it to a final resolution. The claims analyst will direct any investigation or litigation necessary for the defence of the claim. As part of that process, the claims analyst will appoint independent adjusters, experts and/or lawyers, as necessary, for the defence team.

Your role

We require your participation in the investigation and defence of any claim made against you.

This means you must advise the Victor claims analyst and the independent adjuster and/or lawyer of any information you have about the claim.

Once you are made aware that a claim will be or has been made against you, it is important that you gather all documents related to that claim in order to be able to provide such documentation to the independent adjuster or lawyer. It is your obligation to preserve all documents in your possession or control that could be potentially relevant to the claim (i.e., minutes of meetings, correspondence, memoranda, etc.). This obligation extends to electronic documents.

You will be asked to meet with the members of the defence team so that they can prepare your defence. If the claim is made in the form of a legal action, you must attend examinations for discovery, mediation, pre-trial settlement conference or trial, as required.

Your errors and omissions insurance policy requires that the insurance manager first obtains your consent before settling a claim. However, that consent cannot be unreasonably withheld if we have been presented with a reasonable offer to settle.

If your policy reflects that you have purchased coverage subject to a deductible, you must pay that amount to Victor when payment is requested.

Service providers

We use the term service providers to refer to our panel of independent adjusters and lawyers who specialize in the defence of claims made under Victor's programs. These professionals work with you and the claims analyst as part of the defence team.

You will be required to interact with the service providers at various times throughout the life of your claim. It is important to remember that these service providers are only involved in the defence of your claim. They are not involved in any aspects of coverage. If you have any questions about the coverage provided by your policy, please contact the claims analyst.

The claims process

Once the claims analyst has confirmed that your insurance policy provides coverage for the claim that you have reported, the claims analyst will appoint the defence team to act on your behalf.

If the claim is not presented in the form of a lawsuit, the claims analyst may appoint an independent adjuster to investigate and work with you to bring the claim to a final resolution.

If the claim is made in the form of a legal proceeding, counsel will be appointed as a member of the defence team.

You will play a role in developing the strategy for resolution of your claim. As the claim progresses, the lawyer or independent adjuster assigned to your file will develop a proposed resolution strategy, which will be included in their reports. There will be opportunity to discuss this strategy and to provide feedback as the claim develops.



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